No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY et al., minors, by guardian *ad litem*,
Appellants,

vs.

H. FOCKE et al.,
Appellees.

SUPPLEMENTAL BRIEF FOR THE TRUSTEES, APPELLEES, IN RESPONSE TO REPLY BRIEF FOR APPELLANTS.

W. L. STANLEY,
S. HASKET DERBY,
Attorneys for Appellees, Trustees.

No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY et al., minors, by guardian *ad litem*,
Appellants,

vs.

H. FOCKE et al.,
Appellees.

SUPPLEMENTAL BRIEF FOR THE TRUSTEES, APPELLEES, IN RESPONSE TO REPLY BRIEF FOR APPELLANTS.

At the conclusion of the oral argument in this case appellants obtained leave to file a reply brief and leave was also granted to the life tenants and the trustees to answer the same. Upon the filing of said reply brief, copies were forwarded to Honolulu and local counsel for the trustees have now been instructed that no answering brief is deemed necessary except for the purpose of clearing up the facts surrounding a *new* contention made by appellants both in their argument and reply brief—a contention not theretofore made in the case.

On page 22 of the reply brief it is stated that, since the subleases of the Mokuleia property were made for *the whole term* of the head lease, they were in effect a

sale or assignment thereof. To substantiate this point an extract from Washburn on Real Property (5th edition) is cited and four cases, which appear to hold that, as a pure matter of abstract law as between landlord and tenant, a sublease for the *whole balance* of a term operates as an assignment. The whole subject is fully and carefully treated in the 6th edition of Washburn (Vol. I) in Sections 692, 693 and 694. It is there pointed out that not only must the sublease be for the full balance of the term to give it this effect (the retaining of the "smallest reversionary interest"—"a day, an hour, or a minute will be sufficient", Id., Secs. 692 and 693), but also that the reservation of a right of re-entry and other covenants defeat any claim of an assignment (Id., Sec. 694 and cases there cited. See also Null v. Garlington & Co., 242 S. W. 507, 511; Murdock v. Fishel, 121 N. Y. Supp. 624). When it is considered that, in the case at bar, the subleases do not appear in the record on appeal, that they were made, not to one person, but to several different persons, and that the rentals in most of them were not fixed at a definite amount of money, but on contingent amounts of sugar, etc., produced on the premises, it is readily apparent that the principle in question has no bearing on this case and that there was clearly no assignment of the head lease. Moreover, the said principle of real property law as between landlord and tenant in regard to assignments in no sense means that in an entirely different case such as the one at bar there was any *conversion* of the head lease so as to

justify treating the rents from the subleases as corpus instead of income.

It is readily apparent, we think, in view of the above, that, without the subleases before it, this court is in no position to determine that there was an assignment of the head lease and as appellants did not make these subleases a part of the record on appeal (though they were in evidence in the court below) they are in no position to raise this point as to an assignment, which they have sought to inject into the case at the eleventh hour.

There is, however, a much more conclusive answer to the new contention now made and that is that *as a matter of fact* the subleases were *not* made for the *full term* of the head lease, but were so drawn as to end a short period *before* said head lease expired (each sublease also containing a reversionary clause for surrender back to the sublessor prior to the termination of the head lease). This is made perfectly clear by appellants' fourth assignment of error reading as follows:

> "4. The Court erred in not holding under the terms of said will that the trustees thereof, in subleasing all the land comprised in the said Mokuleia lease for the unexpired period *except the last few days of the said term thereof,* in effect sold the said Mokuleia lease at a price payable by installments, such price being the net annual sums received for same; and that the amounts so received and to be received from such subleases or their value as of testator's death form part of the *corpus* of testator's estate" (Record, p. 90).

As before stated, all of the subleases were in evidence in the court below and they showed on their face that they were *not* for the *full term* of the head lease, but held back a *reversionary interest.* No contention was made or could have been made in the court below that the subleases operated as an assignment. The record on appeal was made up under Equity Rule No. 75 of the United State Supreme Court (Record, 106-107) and, in place of the actual testimony and exhibits, a record in narrative form was prepared (Record, 120-147). The subleases were not included in this record for the reason that they were deemed immaterial and their exact terms *were* immaterial under the theory on which the case was tried below and on which it was argued in the Supreme Court of Hawaii. Such terms have only *become* material because of the *new* contention made by San Francisco counsel for the appellants, who was not familiar with the record in the lower court. When this new contention was made on the oral argument the writer objected to its consideration, which objection was not passed on by the court, but, if there was ever a case where such an objection should be sustained, this is such a case. If the point had been made in the original briefs, steps could have been promptly taken to supplement the record, but, as it is, the point was in fact made in the absence of those familiar with the record (except the guardian *ad litem*) and only on the receipt of the reply brief did the appellees learn fully of it.

We think it apparent from the foregoing that this court will not sustain the contention that there was an

assignment of the head lease in the absence of the subleases from the record, but will, if it deems their terms material, call for the production of the subleases. We are informed that counsel for the life tenants contemplate putting the terms of these subleases before the court either by stipulation (if such a stipulation can be secured) or by a motion to amplify the record. The trustees feel sure, however, that, in view of appellants' assignment of error number 4 above quoted and in view of all of the considerations herein advanced, there will be no determination by this court that the subleases constitute an assignment when the fact is patent that they did *not* constitute an assignment and when said subleases were not included in the record on appeal. In other words, the trustees (though believing that the contentions of the life tenants are correct) desire only a determination of the questions involved on the *true* facts of the case and not on any new theory now advanced for the first time on a record which did not contemplate the putting forward of the same.

Apart from the foregoing, the trustees do not feel that appellants' reply brief requires any further answer.

Dated, San Francisco,
July 23, 1923.

Respectfully submitted,
W. L. Stanley,
S. Hasket Derby,
Attorneys for Appellees,
Trustees.